IN THE

Supreme Court of the United States

October Term, 1972

No. 72-374

RUSSELL L. SWARTHOUT,
Petitioner,

vs.

ERIKA OLUND,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Comes now Petitioner Russell L. Swarthout, Pro se, who presents this, his Petition for Rehearing on Order Denying Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and in support thereof states to the Court:

I

On November 13, 1972, the Court denied Petitioner a Writ of Certiorari to the Court of Appeals. The Petitioner states that he has substantial grounds available although not previously presented to this Court in strict compliance with SCR 58 (2).

The Trial Court gave judgment in a diversity tort action to the Plaintiff.

The Defendant with leave of the Trial Court had filed an Amended Answer interposing the affirmative defense of release. The Defendant filed a reply to the Amended Answer asserting that the release was void and unenforceable by reason of procurement through fraud, duress, coercion and undue influence.

The Trial Court on April 16, 1971 filed the MEMORANDUM OF DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW in this case.

As to FINDINGS OF FACT the Trial Court states: "The Court finds that the claimed release (Exhibits 11 and 12) is invalid as a release and that it is void *ab initio* by reason of fraud, duress, coercion and involuntariness," (Joint Appendix p. 531a).

As to CONCLUSIONS OF LAW the Trial Court states: "However, it seems clear to us that under the law of any of these United States this release would be held void," (Joint Appendix p. 532a).

The United States Court of Appeals for the Sixth Circuit on May 5, 1972 affirmed the Trial Court decision. To the Defendant's argument on appeal that the Trial Court erred in finding inoperable a prior release by Plaintiff of all claims against Defendant the Court of Appeals in its Opinion stated: "Swarthout also urges that the release could not be avoided by Olund without tender of the consideration given in exchange therefor, relying on the law of Florida, where the release was executed. We need not reach this issue. The judgment was offset by the consideration. This court "must disregard any error . . . which does not effect the substantial rights of the parties." R.61, Fed. R. Civ. P.; see 28 U.S.C. §2111. Further, the issue was not raised below and will not be considered on appeal. See *Wiper* v. *Great Lakes Engineering Works*, 340 F. 2d

727, 731 (6th Cir.), cert. denied, 382 U.S. 812 (1965). (Appendix A hereto, infra p. 4a).

II

Petitioner herein respectfully submits that the Trial Court decision was erroneous in that it decided as a matter of law that the written release executed between the parties to this action was void rather than voidable because such a determination was contrary to a settled rule of the United States Supreme Court and the great weight of authority. Thus, where threats of violence against a woman plaintiff, her husband, and children prompted her to execute a deed to real property, such threats constituted duress on her mind which had the effect of making her conveyance voidable and subject to affirmance or disaffirmance but not void.

> "Acts induced by duress such as is here relied on, which operate only on the mind and falls short of actual physical compulsion, are not void in law, at the election of him whose act was induced by it." *Barnette* v. *Wells Fargo Nevada National Bank*, 270 U.S. 438, 444; 70 L. ed. 669, 674, 675 (1925). See also 77 A.L.R. 2d. 428.

The Trial Court in order to arrive at a verdict for Plaintiff concluded, "That the claimed release herein (Exhibits 11 and 12) is invalid as a matter of law. The atmosphere in which this plaintiff's signature was obtained, together with the circumstances attendant thereto, preclude the possibility of this having been a free and voluntary act by plaintiff. The very presence of defendant, an attorney and judge, and of his companion, also a judge and the person who had previously told plaintiff that he would see to it that she would lose her job if she did anything about the case, constituted coercion and duress.

Plaintiff was as much alone and unprotected in this situation as she had been in the prior one with defendant on the night of January 16, 1963." (Joint Appendix p. 532a).

The foregoing acts recited by the Trial Court may have amounted to duress and coercion which operate on the mind of plaintiff and render the act of signing a release voidable which may be affirmed or disaffirmed at her election, but this record is completely barren of any actual physical compulsion that would render a release void.

Hence, the 6th Circuit, having apparently adopted the finding of the Trial Court that the release was void rather than voidable and therefore unenforceable, also acted contrary to a settled precedent of this Court and the great weight of authority.

This erroneous determination was not harmless error which did "not affect the substantial rights of the parties" as the 6th Circuit claimed (Appendix A hereto, infra p. 4a). Had the Trial Court concluded that the release was merely voidable, then Florida law, as recited in *Davis* v. *Hefty Press, Inc.*, 11 So. 2d. 884 (1943), and the great weight of authority represented by 77 A.L.R. 2d. 428, would have dictated a verdict for the petitioner.

Under Florida law and the great weight of authority the only manner in which Plaintiff could legally disaffirm her release and thus overcome the presumption of validity is by offering competent proof that she had returned or offered to return the $1,000.00 paid to her by defendant as consideration for the release. Since Plaintiff failed to offer such proof, it was incumbent upon the Trial Court to uphold the validity of the release and enter judgment for Defendant.

It is significant that a Florida Court expressly rejected the expedient, adopted by the Trial Judge in this case and

affirmed by the Sixth Circuit of crediting the consideration for release on a judgment awarded to Plaintiff after the release is set aside; in *Overstreet* v. *Atlantic Coastline R.R. Co.*, 152 So. 2d 188 (1962), the Court declined the offer of Plaintiff to credit in the foregoing manner the money consideration she received for executing a release, upheld the validity of the latter by declining to set it aside because she had refused to return the consideration for the release, and concurred in the dismissal of her action for damages on the released claim.

The necessity of tendering the consideration before a voidable release can be disaffirmed is recognized by the great weight of authority. 134 A.L.R. 6. The Michigan Supreme Court, in adopting this principle demonstrated its rationale by pointing out that without the necessity for a tender, a climate would be created in which free and easy avoidance of releases would discourage settlement of disputes and conflict with a longstanding policy of our courts favoring the private resolution of legal controversies. *Carey* v. *Levy*, 329 Mich. 458 (1951).

As another Court has pointed out:

> "To permit her to retain the money that she got under the release, and also to repudiate same, would allow her to retain the benefits and reject the burdens. It would allow her to divide, or separate the transaction by accepting the favorable part and rejecting what was unfavorable to her."

Birmingham Ry., Light and Power Co. v. *Jordan*, 54 So. 280, 282 (1911).

If Plaintiff had been required to follow the precedent of this Court in its prior decision in *Barnette* v. *Wells Fargo Nevada National Bank, supra*, the Plaintiff would have had the additional burden of proving that she had disaffirmed

her voidable release within a reasonable time. The Court of Appeals has acknowledged this requirement by ruling that an attempted recission, of a release for fraud which came 21 months after execution of the latter, was too late. *Jack Mann Cheverolet* v. *Associates Investment Co.*, 125 F.2d. 778 (1942).

In the case before us, a release was executed on March 1, 1963; yet Plaintiff made no effort to avoid it until Defendant pleaded same and she filed a reply claiming it was void on July 5, 1968. Furthermore, plaintiff did not commence her action for damages, until December 28, 1964, or almost 22 months after the execution of the release. It is clear, assuming a voidable document, that her attack on its validity came too late.

Finally, the Court of Appeals refused to decide the issue of whether the release could be avoided under Florida law without a tender of the consideration given to her, because it had not been raised in the Trial Court. Not so. Defendant, having pleaded the release, was entitled to rely on Florida law and the great weight of authority that it was at worst voidable and thus enforceable until plaintiff sustained her burden of proving disaffirmance. The burden of raising the issue of tender in the Trial Court was on plaintiff, not defendant; hence, defendant cannot be penalized on appeal if it was not raised below. The issue presented for decision by the Trial Court was whether the release was voidable but valid because there had been no disaffirmance by plaintiff or void with no requirement of rescission. Trial Court, in placing a void construction on the release, acted contrary to Florida law and the great weight of authority, in a manner which substantially prejudiced petitioner's rights.

III

CONCLUSION

For the reasons above submitted, petitioner respectfully suggests that this Court reconsider its Order Denying Certiorari, withdraw said Order, and grant Certiorari herein to the Court of Appeals.

Respectfully submitted,
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CERTIFICATE

Counsel hereby certifies that the foregoing Petition For Rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58 (2) of the Rules of this Court.

RUSSELL L. SWARTHOUT
Pro Se

Dated: December 7, 1972

No. 71-1716

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ERIKA OLUND,
Plaintiff-Appellee,

v.

RUSSELL L. SWARTHOUT,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May, 5, 1972.

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and ENGEL*, District Judge.

PHILLIPS, Chief Judge. This is an appeal from a judgment for plaintiff in a diversity tort action. We affirm.

Only a brief statement of the procedural facts is required. Erika Olund filed this action against Russell Swarthout in December, 1964. Swarthout answered in May, 1965, denying the material allegations of the complaint. Some three years later, following the pretrial conference, Swarthout amended the answer to interpose the affirmative defense of release. One week later Olund filed a reply to the amended answer, asserting that the release was void and unenforceable by reason of procurement through fraud, duress, coercion, and undue influence.

*Honorable Albert J. Engel, Judge, United States District Court for the Western District of Michigan, sitting by designation.

In May, 1969, Olund filed an amended reply to the amended answer. Swarthout filed a demand for a trial by jury as a matter of right on all issues nine days thereafter. He further moved for a jury trial on all issues as a matter of discretion. Following a hearing on the motion, Judge Thomas P. Thornton denied the motion and ordered the entire case tried without a jury.

Trial to the Court consumed five trial days; conflicting evidence was introduced as to all material issues. Judge Thornton found for plaintiff in the amount of $15,000 compensatory damages. Swarthout appeals, contending that he was deprived of his right to trial by jury and that the verdict was unsupported by the evidence and excessive.

Only the jury trial issue requires extended consideration. The Federal Rules of Civil Procedure provide:

"Rule 38.
"JURY TRIAL OF RIGHT

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"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

"Rule 39.
"TRIAL BY JURY OR BY THE COURT

"(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to

demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issue."

Before this Court Swarthout contends that the filing of Olund's amended reply gave him ten days in which to demand a jury trial on the issues presented therein and that his demand was served within that ten day period. He further asserts that a jury trial on all issues should have been ordered as a discretionary matter. We disagree with these contentions. The demand for trial by jury was first injected into the case some four and one-half years after the action was commenced, following pleading amendments, extensive discovery, and a pretrial conference. The amended reply introduced no new issues into the action. The issue of release was asserted and joined in July, 1968. Under these circumstances, the demand was untimely. See *Western Geophysical Co. of America* v. *Bolt Assoc., Inc.* 440 F. 2d 765, 769 (2d Cir. 1971); *Connecticut General Life Ins. Co.* v. *Breslin*, 332 F. 2d 928, 931 (5th Cir. 1964); 5 Moore, Federal Practice, ¶ 38.41 (2d ed.); 9 Wright & Miller, Federal Practice & Procedure, Civil § 2320. Further, we find no abuse of discretion under R. 39(b), Fed. R. Civ. P.

Swarthout's contentions that there is insufficient evidence to support the findings of liability, unenforceability of the release signed by Olund, and amount of damages are wholly without merit. We have given "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses" and are unable to say that his findings of fact are clearly erroneous. R. 52(a), Fed. R. Civ. P.

Swarthout also urges that the release could not be

avoided by Olund without tender of the consideration given in exchange therefore, relying on the law of Florida, where the release was executed. We need not reach this issue. The judgment was offset by the consideration. This court "must disregard any error . . . which does not affect the substantial rights of the parties." R. 61, Fed. R. Civ. P.; see 28 U.S.C. § 2111. Further, the issue was not raised below and will not be considered on appeal. See *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727, 731 (6th Cir.), cert. *denied*, 382 U.S. 812 (1965).

Affirmed.